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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91211530
Party	Defendant William T. Odonnell DBA Odonnell Entertainment
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board**

Serial No. 85/785,996
For the mark ADVENTURES OF SHADOW,

Registration No. 3,991,181
For the mark ADVENTURES OF SHADOW,

J-Lynn Entertainment, LLC,

Opposer,

vs.

William T. Odonnell, d/b/a Odonnell Entertainment,

Applicant.

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Opposition No. 91211530 (Parent)
Cancellation No. 92056491 (Child)

**TRIAL BRIEF OF APPLICANT / REGISTRANT
WILLIAM T. O'DONNELL, D/B/A O'DONNELL ENTERTAINMENT**

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I. INTRODUCTION

Petitioner / Opposer J-Lynn Entertainment, LLC (hereinafter “Petitioner”) petitioned to cancel U.S. Registration No. 3682041 owned by William T. Odonnell, d/b/a Odonnell Entertainment (hereinafter “Registrant”). Petitioner also filed a notice of opposition against the registration of Registrant’s application more fully set forth in U.S. Serial No. 85785996. The consolidated matters are now before the Board for its consideration.

As can more fully be seen in Petitioner’s pleadings, at the heart of the matter is the Registrant’s efforts to enforce his valid and subsisting trademark rights and Petitioner’s unfounded belief that those rights do not exist. As such, Petitioner instituted the subject proceedings.

Although to some degree admirable in its effort, these cases have ultimately been complicated at times by the *pro se* Petitioner. However, in the end it remains a relatively simple case. Has the Petitioner met its burden to prove that (1) Registrant committed fraud on the U.S. Patent and Trademark Office; (2) abandoned the trademarks at issue; or (3) never used the trademarks at issue?

In the end the simple answer must be no, Petitioner has failed to meet these burdens. As such, it is respectfully requested that the Board deny Petitioner’s requested relief and deny and dismiss the Petition to Cancel and Notice of Opposition at issue in this matter.

II. RECORD BEFORE THE BOARD

Depositions

Deposition of Robert Holmes, Jr. dated December 3, 2014

Deposition of Petitioner Tamar Medina dated June 12, 2015

Deposition of Registrant William O'Donnell dated May 26, 2015¹

Notices of Reliance²

Opposer's Notice of Reliance (Exhibit 1)

Opposer's Notice of Reliance (Exhibit 2)

Opposer's Notice of Reliance (Exhibits 3 and 4)

Opposer's Notice of Reliance (Exhibit 5)

Opposer's Notice of Reliance (Exhibit 6)

Opposer's Notice of Reliance (Exhibit 7)

Opposer's Notice of Reliance (Exhibits 8 to 11)

Opposer's Notice of Reliance (Exhibits 12 to 14)

Opposer's Notice of Reliance (Exhibit 15)

Trademark Registrations & Applications

U.S. Registration No. 3682041

U.S. Serial No. 85785996

¹ Registrant was called as an adverse witness during Petitioner / Opposer's trial period.

² Petitioner / Opposer submitted nine (9) separate notices of reliance that were not numbered. As such, Registrant, by counsel, will identify the same by and through the exhibit numbers which are sought to be introduced by and through the same identify the same.

III. OBJECTIONS TO EVIDENCE

A. Deposition of Robert Holmes, Jr.

A party may take testimony only during its assigned testimony period, except by stipulation of the parties approved by the Board, or, on motion, by order of the Board. TBMP § 703.01(c). In the instant matter, the deposition of Robert Holmes, Jr. occurred while this case was suspended. As such, it did not comply with TBMP § 703.01(c) and, accordingly, should be stricken from the record of this matter.

By way of history, the Order of the Board dated October 28, 2014 reset trial dates in the matter such that Petitioner's trial period ran from November 20, 2014 through December 20, 2014. *See Order* dated October 28, 2014. On or about December 1, 2014 Registrant's counsel filed a motion to withdraw as counsel. On December 3, 2015 the Board issued an Order suspending the matter, as well as Petitioner's trial period, pending Registrant locating new counsel. *See Order* dated December 3, 2015. Based upon information and belief, later that day Petitioner moved forward with the Deposition of Mr. Holmes despite the case being suspended.

By Order dated May 1, 2015 Petitioner was permitted an additional 19 days to complete its trial testimony period through June 12, 2015. *See Order* dated May 1, 2015.

Accordingly, it is submitted that the testimony of Mr. Holmes was taken outside of the Petitioner's trial period as required under TBMP § 703.01(c). As such, and as Registrant has not consented to the taking of testimony outside of Petitioner's trial period, it is respectfully requested that the Board strike the Deposition of Robert Holmes, Jr. from the record of this matter.

B. Notices of Reliance

Certain types of evidence, such as official records and printed publications as described in 37 CFR § 2.122(e), need not be introduced in connection with the testimony of a witness but may instead be made of record by filing the materials with the Board under cover of one or more notices of reliance during the testimony period of the offering party. TBMP § 704.02. Evidence not obtained and filed in compliance with the rules of practice governing *inter partes* proceedings before the Board will not be considered by the Board. TBMP § 706.

In this regard, Registrant, by counsel, objects to the following Notices of Reliance and Exhibits attached hereto as not conforming with TBMP § 704 *et seq.*:

Objection to Opposer's Notice of Reliance (Exhibit 1); Opposer's Notice of Reliance (Exhibit 2); Opposer's Notice of Reliance (Exhibits 3 and 4); Opposer's Notice of Reliance (Exhibit 5); Opposer's Notice of Reliance (Exhibit 7); Opposer's Notice of Reliance (Exhibits 8 through 11); Opposer's Notice of Reliance (Exhibits 12 and 14)³: Registrant objects to the entry of the evidence in these notices of reliance generally insofar as they do not conform with the evidence permitted to be introduced via notice of reliance pursuant to TBMP § 704 *et seq.* Moreover, the evidence constitutes inadmissible hearsay and lacks authenticity and proper foundation to be considered by this court. *See generally* FRE 801 *et seq.*; *see also* FRE 901 *et seq.*

³ Registrant does not object to Exhibit 6 as it is proper and within the scope of the TBMP for Petitioner to submit Registrant's responses to written discovery via a notice of reliance. Additionally, Registrant does not object to Exhibit 13 which purports to be the deposition of Registrant. Per the rules of the TBMP, such is properly a part of the record.

Registrant further objects to the admission to Opposer's Notice of Reliance (Exhibit 5) on the grounds that it constitutes an expert report not properly disclosed during the course of discovery.

Registrant also has provided a more thorough objection to Opposer's Notice of Reliance (Exhibit 15) above which seemingly attempts to introduce the "trial" testimony of Robert Holmes, Jr.

IV. STATEMENT OF THE FACTS

A. The Application and Registration at Issue

Registrant is the owner of U.S. Registration No. 3682041 for the trademark ADVENTURES OF SHADOW and design as set forth below:



U.S. Registration No. 3682041. The registration was registered on or about September 15, 2009 and is used on or in connection the following goods:

Motion picture films relating to a dog character and her adventures; Entertainment motion picture films featuring a dog character and her adventures, documentaries, documentaries on dogs, comedy, variety, drama, family drama; pre-recorded entertainment, namely, films, downloadable audio and video recordings, video cassettes, video tapes, DVDs, high definition digital discs, and video discs featuring a dog character and her adventures, documentaries on dogs and documentaries in International Class 9;

Series of fiction books; series of fiction books featuring the adventures of a dog character; non-fiction books in the field of dogs and historical landmarks; photo books; photo books, namely, books featuring photographs, lithographs, prints and pull-out posters; coloring books; children's activity books; children's activity books with stickers; comic books; greeting cards, post cards and picture

postcards; magazines concerning dogs; and calendars in International Class 16;
and

Purified bottled drinking water in International Class 32.

Id.

Registrant is also the applicant for U.S. Serial No. 85785996 for an identical trademark, namely ADVENTURES OF SHADOW and design as set forth above, for use in connection with the following goods:

Combinations clothing, namely, tee shirts, sweatshirts, jackets, aprons, tank tops, long sleeve t-shirts, sweaters, baseball jerseys, polo shirts, muscle t-shirts, toddler t-shirts, and hooded shirts; headwear in International Class 25.

U.S. Serial No. 85785996.

U.S. Registration No. 3682041 and U.S. Serial No. 85785996 are the subjects of this consolidated opposition and cancellation proceeding under No. 91211530.

B. History of the Parties

Registrant owns the valid and subsisting federal trademark for ADVENTURES OF SHADOW and design as more fully set forth in U.S. Registration No. 3682041. As Petitioner's pleadings concede, the relationship of the parties commenced during Petitioner's efforts to enforce his valid trademark. *See Notice of Opposition* filed July 12, 2013 (hereinafter *Notice of Opposition*).

C. Petitioner's Claims

Petitioner's claims are set forth in the Petition to Cancel filed on or about November 27, 2012 and the Notice of Opposition filed on or about July 12, 2013.

In regard to the Petition to Cancel U.S. Registration No. 3682041, Petitioner alleges that (1) the Registrant has never used the trademark in connection with the goods identified in the

registration, (2) that Registrant abandoned the trademark, and (3) that the Registrant committed fraud on the U.S. Patent and Trademark Office in the procurement of the subject registration. *See Untitled Petition to Cancel* dated November 27, 2012.

In the Notice of Opposition opposing the registration of U.S. Serial No. 85785996, Petitioner alleges that Registrant's trademark is not entitled to register on the grounds that (1) the trademark is not in use as claimed in the application, (2) Registrant's sole basis for filing the subject application was to strengthen a fictional civil law suit against Petitioner, and (3) to strengthen the Registrant's case to oppose the registration of Petitioner's trademark, again which was never done. *See Notice of Opposition*.

D. Registrants Use and Continued Use of the Marks at Issue⁴

1. Class 9 Motion Picture and Documentary Goods

Registrant was called as an adverse witness during Petitioner's trial period. During his deposition, Registrant testified to using the trademark at issue in connection with motion pictures or videos that broadcasted on television. *See Deposition of William ODonnell* at pp. 49-50, Exhibit 3 (hereinafter *ODonnell Depo.*). Specifically, Mr. ODonnell identified that a video had aired on television and that the trademark at issue and subject of the contested registration had appeared in that video. *Id.* Videos using the trademark also aired on television during a U.S. Post Office Ceremony which was broadcast to the Pacific Northwest in June of 2007. *Id.* at pp. 52-53, Exhibit 5. The videos featuring the trademark have also appeared on the Registrant's web site, the History Channel, RealTV as well as local news channels. *Id.* at pp. 53-54, Exhibit 6; *See also id.* at pp. 58-59.

⁴ Of note, many of the records ordinarily kept in the course of business for the Registrant were destroyed during a move and destruction of a hard drive. *ODonnell Depo.* at pp. 82-85, Exhibit 17. Notwithstanding this fact, Registrant submits that he has submitted more than sufficient evidence to refute the Petitioner's claims of non-use in the instant matter.

More generally, Registrant testified that films with the contested trademark have appeared on Cox Cable and Access Humboldt Channel 12. *ODonnell Depo.* at p. 57. Petitioner has also aired television programs using the trademark produced by the Institute for Creation Research, Answers for Genesis. *Id.* In regard to the scope of the Access Humboldt Broadcasts, Petitioner testified they extend from Northern California to the Oregon Boarder. *Id.*

The videos were also aired on a station in Dalles, Oregon again utilizing the subject trademark. *ODonnell Depo.* at p. 58. They have also been streamed over the Internet and on Facebook. *Id.* at p. 59. All of the films have displayed the subject trademark at issue. *Id.* at 59-60. Additionally, Petitioner provided copies of his federal tax return for 2007 establishing claimed payments for these videos in 2007. *Id.* at pp. 60-61, Exhibit 7.

2. Class 16 Calendars

Registrant also testified to using the trademark at issue on or in connection with calendars. *ODonnell Depo.* at pp. 68-69, Exhibit 10. Specifically, Registrant provided evidence of use of the trademark in connection with a 2012 calendar. *Id.*

3. Class 32 Bottled Water

Registrant began use of the subject trademark in connection with bottled water in 2006. *See generally ODonnell Depo.* at pp. 64-70, Exhibits 8, 10. Use of the trademark at issue was affixed to labels directly placed on bottled water. *Id.* at pp. 68-69, Exhibit 10.

Sales most likely initially began at Bigfoot Days, an international festival, that occurs annually just before Labor Day. *ODonnell Depo.* at pp. 64-65. People come from all over the country to attend this 25-year old festival. *Id.* at p. 66.

Sales of the bottled water utilizing the trademark at issue were also sold at a store known as the Treasure Trove in Eureka, California. *ODonnell Depo.* at pp. 70-74. Again, Registrant testified that, based upon the tourist attractions in that part of the country, the store was

frequented by tourists from all over the country. *Id.* at p. 71; *see also* pp. 73-74. The water was even shipped to Louisiana for one customer. *Id.* at p. 74. Registrant sold items bearing the subject trademark at this location from 2008 through 2012 and, specifically, bottled water branded with the ADVENTURES OF SHADOW and design trademark. *Id.* at pp. 71-72.

Evidence of sales at this location were also provided. *ODonnell Depo.* at pp. 72-73, Exhibit 11.

4. Advertising of the Subject Trademark

Registrant advertises his products on Facebook. *ODonnell Depo.* at pp. 74-76, Exhibit 12. Registrant also advertises his products over the Internet at *Odonnellentertainment.com*. *Id.* at pp. 76-77. Registrant also advertises his products bearing the subject trademark at *adventuresofshadow.com*. *Id.* at p. 77, Exhibit 13.

Registrant also maintains a Twitter account for advertising of the products sold under the subject trademark under the Twitter designation @travelofshadow. *ODonnell Depo.* at pp. 78, Exhibit 14. Registrant maintains a LinkedIn account wherein use of the trademark in connection with the subject goods are advertised. *Id.* at p. 78, Exhibit 15.

Registrant has also advertised his trademark in connection with the goods identified in the Yellow Pages, AT&T Phonebook, and Hagadone Black phonebook. *ODonnell Depo.* at p. 81.

V. ARGUMENT

A. Burden of Proof

The burden of proof in the instant matter is upon the Petitioner to establish, by a preponderance of the evidence, the claims in the instant matter. *West Florida Seafood vs. Jet*

Restaurants, 31 F.3d 1122, 1125, 31 USPQ2d 1660, 1662 (Fed. Cir. 1994). In the instant case, Petitioner simply cannot meet this burden.

B. Registrant Has and Continues to Use His Trademark in Interstate Commerce

1. Class 9 Motion Picture and Documentary Goods

In a trademark or service mark application based on use in commerce under §1(a) of the Trademark Act, 15 U.S.C. §1051(a), the mark must be in use in commerce on or in connection with all the goods and services listed in the application as of the application filing date. *See* 37 C.F.R. §§2.2(k)(1), 2.34(a)(1)(i). TMEP § 901. As set forth above, Registrant has provided uncontested evidence of its use and continued use of its trademark in connection with the Class 9, 16, and 32 goods.

With respect to the goods in Class 9, Registrant testified that videos or films had aired on television and that the trademark at issue has appeared in those videos. *ODonnell Depo.* at p. 49-50. Specifically, films or documentaries using the trademark have aired on television during a U.S. Post Office Ceremony which was broadcast to the Pacific Northwest in June of 2007. *Id.* at pp. 52-53, Exhibit 5. The videos featuring the trademark have also appeared on the Registrant's web site, the History Channel, RealTV as well as local news channels. *Id.* at pp. 53-54, Exhibit 6; *See also id.* at pp. 58-59.

Registrant also provided that films with the contested trademark have appeared on Cox Cable and Access Humboldt Channel 12. *ODonnell Depo.* at p. 57. Petitioner has also aired television programs using the trademark produced by the Institute for Creation Research, Answers for Genesis. *Id.* In regard to the scope of the Access Humboldt Broadcasts, Petitioner testified they extend from Northern California to the Oregon Border. *Id.*

Finally, the videos were also aired on a station in Dalles, Oregon again utilizing the subject trademark. *ODonnell Depo.* at p. 58. They have also been streamed over the Internet and on Facebook. *Id.* at p. 59. All of the films have displayed the subject trademark at issue. *Id.* at 59-60. Additionally, Petitioner provided copies of his federal tax return for 2007 establishing claimed payments for these videos in 2007. *Id.* at pp. 60-61, Exhibit 7.

Thus, in regard to the standard for use in commerce it is clear from the evidence of record that Petitioner has and continues to use his trademark in connection with his Class 9 goods. As such, it is submitted that Petitioner cannot and has not met its burden under *West Florida Seafood* to cancel Petitioner's registration with respect to the Class 9 goods.

2. Class 16 Calendars

Likewise, Registrant testified to using the trademark at issue on or in connection with calendars. *ODonnell Depo.* at pp. 68-69, Exhibit 10. Specifically, Registrant provided evidence of use of the trademark in connection with a 2012 calendar. *Id.*

Registrant's testimony in this regard was not challenged by the Petitioner and remains uncontroverted in this matter.

Thus, in regard to the standard for use in commerce it is clear from the evidence of record that Petitioner has and continues to use his trademark in connection with his Class 16 goods. As such, it is submitted that Petitioner cannot and has not met its burden under *West Florida Seafood* to cancel Petitioner's registration with respect to the Class 16 goods.

3. Class 32 Bottled Water

Finally, Registrant provided ample evidence and testimony that he began use of the subject trademark in connection with bottled water in 2006. *See generally ODonnell Depo.* at pp. 64-70, Exhibits 8, 10. Use of the trademark at issue was affixed to labels directly placed on bottled water. *Id.* at pp. 68-69, Exhibit 10.

Sales most likely initially began at Bigfoot Days, an international festival, that occurs annually just before Labor Day. *ODonnell Depo.* at pp. 64-65. People come from all over the country to attend this 25-year old festival. *Id.* at p. 66.

Sales of the bottled water utilizing the trademark at issue were also sold at a store known as the Treasure Trove in Eureka, California. *ODonnell Depo.* at pp. 70-74. Again, Registrant testified that, based upon the tourist attractions in that part of the country, the store was frequented by tourists from all over the country. *Id.* at p. 71; *see also* pp. 73-74. The water was even shipped to Louisiana for one customer. *Id.* at p. 74. Registrant sold items bearing the subject trademark at this location from 2008 through 2012 and, specifically, bottled water branded with the ADVENTURES OF SHADOW and design trademark. *Id.* at pp. 71-72.

Evidence of sales at this location were also provided. *ODonnell Depo.* at pp. 72-73, Exhibit 11.

Accordingly, in regard to the standard for use in commerce it is clear from the evidence of record that Petitioner has and continues to use his trademark in connection with his Class 32 goods. As such, it is submitted that Petitioner cannot and has not met its burden under *West Florida Seafood* to cancel Petitioner's registration with respect to the Class 32 goods.

C. Registrant Has Not Abandoned His Trademark

It is the Petitioner's burden to establish the elements for abandonment in the instant matter by a preponderance of the evidence. *West Florida Seafood*, 31 F.3d at 1125, 31 USPQ2d at 1662. Again, Petitioner has failed to meet this burden.

In general, a trademark shall be deemed to be "abandoned" if either of the following occurs:

- (1) When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive

years shall be prima facie evidence of abandonment. “Use” of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark.

(2) When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark. Purchaser motivation shall not be a test for determining abandonment under this paragraph.

15 U.S. Code § 1127.

In the instant case, there has been no evidence submitted or advanced concerning whether Registrant’s trademark has become generic for the goods with which they are used. Within that context, the only manner by and through which the trademark could have become abandoned is by and through Registrant’s (1) discontinuation of the trademark without the (2) intent to resume such use. 15 U.S. Code § 1127. But again and as above, Petitioner has failed to prove even the first element of abandonment by a preponderance of the evidence let alone addressing the second.

As set forth above, Registrant is still using the trademark in connection with the Class 9, 16, and 32 goods. As such, the first element cannot be satisfied and, as such, it is respectfully requested that the Board find against the Petitioner for this claim for its failure to meet its burden under *West Florida Seafood*.

But assuming, *en arguendo*, somehow this burden is found to have been established by the Petitioner, the record is completely devoid of any evidence whatsoever concerning the Registrant’s requisite lack of intent to resume use. 15 U.S. Code § 1127. This, in large part, is because Registrant is still using the trademark at issue with the goods at issue.

As such, it is respectfully submitted that the Petitioner has failed to establish, by a preponderance of the evidence, that Registrant has ceased use of the trademark at issue in connection with the goods in the registration. But even assuming the Board were to disagree, *en*

arguendo, there is no evidence that Registrant does not intend to resume use, primarily because Registrant continues to use the same today.

Accordingly, this claim of the Registrant must also be denied.

D. There is No Evidence of Fraud Upon the USPTO

The standard to establish fraud before the Trademark Trial and Appeal Board is set for in *In re Bose Corp.*, 91 U.S.P.Q.2d 1938 (Fed. Cir. 2009). The Bose court reaffirmed that in order to prove fraud on the USPTO, there must be substantial evidence that the applicant or registrant *intended to deceive* the USPTO. *Id.* There is no fraud “if a false misrepresentation is occasioned by an honest misunderstanding or inadvertence without a willful intent to deceive.” *In re Bose Corp.*, 91 U.S.P.Q.2d 1938 (Fed. Cir. 2009).

In the instant case, there is simply no evidence of fraud that would satisfy the *Bose* court. As set forth above, Registrant is using and continues to use his trademarks consistent with the goods recited in the registration. Although Petitioner has attempted to set out theories of prosecution that would undermine Registrant’s established rights, there is simply no basis for the fraud allegation in the instant matter.

As such, it is respectfully submitted that the Petitioner has failed to prove its case against the Petitioner on the fraud count and it too should be dismissed.

VI. CONCLUSION

WHEREFORE the Registrant, by counsel, respectfully requests the Board to deny the pleaded relief, deny the Petition to Cancel and the Notice of Opposition, and permit U.S. Registration No. 3,991,181 to remain registered and U.S. Serial No. 85/785,996 to move forward to registration.

Respectfully submitted this 2nd day of November, 2015.

/Matthew H. Swyers/
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Applicant.

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Opposition No. 91211530 (Parent)
Cancellation No. 92056491 (Child)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of the foregoing this 2nd day of November,
2015 to be served, via first class mail, postage prepaid, upon:

NEADOM T MEDINA
J LYNN ENTERTAINMENT LLC
PO BOX 12365
MILL CREEK WA 98012

/Matthew H. Swyers/
Matthew H. Swyers